U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

April 14, 2003

FLSA2003-2

Dear ***Name****,*

I am writing in reply to your letter of September 16, 2002, to Assistant Secretary of Labor Christopher Spear. You request a letter ruling on numerous hypothetical questions divided into three issue areas and offer several suggestions for action by the Department, all relating to the application of the Fair Labor Standard Act (FLSA), particularly Section 3(e)(4)(a), to volunteer fire fighters.

As you know Section 3(e)(4)(a) of the FLSA states that the "term 'employee' does not include any individual who volunteers to perform services for a public agency" if the individual receives no compensation or is paid a nominal fee, expenses or reasonable benefits, and if "such services are not the same type of services which the individual is employed to perform for such public agency."

The FLSA recognizes the generosity and public benefits of volunteering, and does not pose obstacles to bona fide volunteer efforts for charitable and public purposes except in very limited circumstances. In this spirit, in enacting the 1985 FLSA Amendments, the Congress sought to ensure that true volunteer activities were neither impeded nor discouraged. Congress, however, also wanted to minimize the potential for abuse or manipulation of the FLSA's minimum wage and overtime requirements in "volunteer" situations. To this end, Congress narrowly constrained the circumstances in which individuals may volunteer services to a public agency by which they are employed: (1) the individual may receive no compensation, or is paid only expenses, reasonable benefits or a nominal fee, and (2) the volunteer services may not be the same services as those which the individual is employed to perform for his or her employer. These narrow constraints offer public sector employees a vast array of opportunities to serve their communities as volunteers.

Please be assured that this Administration fully supports volunteerism and is committed to work with organizations like yours to ensure that citizens are able to freely volunteer their services for charitable and public purposes.

We will restate your scenarios, hypothetical questions, and suggestions, followed by our responses.

ISSUE ONE -- Circumstances in which public agency employees may volunteer their services for a public agency fire department serving the same jurisdiction.

SCENARIO ONE

- Individual is a mechanic employed by County A Parks Department.
- The individual also serves as a volunteer fire fighter with the County A Fire and Rescue Department (FRD).
- The FRD, a combination department, is a joint powers board which is funded by both City A and County A.
- County A and the FRD are listed separately by the Census Bureau.
- County A provides the majority of funding to the FRD and also appoints and removes Board members.
- The individual is allowed to respond to fire calls during his work hours with the Parks Department.
- The individual is not required to take personal leave in order to be paid for his volunteer fire fighting time.

- The Parks Department gives the individual paid leave for the time spent as a volunteer fire fighter.

Q.1 Are County A and the FRD the same public employer?

A.1 Whether two entities of a local government constitute the same public agency can only be determined on a case-by-case basis. The attached letter dated June 7, 2002 provides a framework for making such a determination and identifies factors that are relevant to the determination. Your letter does not provide information relevant to a number of the factors set forth in that letter, such as: whether the two agencies have separate payroll and retirement systems; whether they both have the authority to sue and be sued in their own names; whether they have separate hiring and other employment practices; and how they are treated under state law. Moreover, the information you have provided offers little information on the level of integration of County A and FRD operations and control of the FRD operations by County A.

Therefore, we are unable to provide a definitive response with regard to whether these agencies are two separate agencies or not. If those other factors also show that the agencies should be treated as separate entities, as they are by the Census of Governments, then we would agree that they are not the same employer and an employee of one could volunteer for the other.

Q.2 Is the individual's status as a bona fide volunteer jeopardized because he receives paid leave from the Parks Department for his time responding to fire calls?

A.2 Assuming that the County Parks Department and the FRD are separate agencies, the fact that the Parks Department allowed its employee to cease his usual duties to respond to fire calls and paid the employee for his normal work hours spent on such calls would not make the mechanic an employee of the FRD. However, such time would be compensable hours worked for the Parks Department and would have to be counted when computing total hours worked for purposes of overtime.

If the time off involves the employee’s use of paid personal leave earned with the Parks Department, which the individual may use as he or she sees fit -- including for time spent as a volunteer fire fighter -- the individual's status as a bona fide volunteer to the FRD is not jeopardized and the hours would not be compensable hours worked for the Parks Department.

Assuming that the County Parks Department and the FRD are part of the same public agency, if the County pays the employee wages for the hours he works as a firefighter, then the County employs him as both a mechanic and as a firefighter. In essence, he is employed by the County as both a full-time mechanic and as a part-time firefighter. Therefore, he would not be able to serve additional hours as a volunteer firefighter for the County, because of the statutory prohibition against an employee volunteering to his own agency to perform the same type of services he is employed to perform.

Q.3 Is the employee performing the same or similar services?

A.3 Although you do not describe the services provided as a mechanic or a fire fighter, these two occupations clearly are categorized under different 3-digit codes in the Dictionary of Occupational Titles. Consequently we believe that serving as a mechanic and serving as a firefighter do not involve the same type of services, absent evidence to the contrary.

Q.4 Is this the type of situation that the FLSA was truly intended to protect employees from?

A.4 In enacting the 1985 FLSA Amendments Congress sought to ensure that true volunteer activities were neither impeded nor discouraged by the FLSA. Congress was equally clear, however, that it recognized and wanted to minimize the very real potential for abuse or manipulation of the FLSA’s minimum wage and overtime requirements.

Q.5 Is the County liable for overtime earned during the fire calls answered outside the employee's regular working day?

A.5 If the employee is a bona fide volunteer, either because he is volunteering to a separate public agency or is not performing the same or similar services (see discussion above), the time spent on fire calls outside the employee's regular Parks Department working day will not be compensable time under the FLSA, and thus would lead to no FLSA required overtime.

Q.6 (first paragraph on page 4 of your letter) May the County automatically charge the time spent responding to a fire call against the employee's compensatory, vacation or other leave time?

A.6 A public sector employer may at any time require an employee to take time off from work and to use compensatory time in payment for the leave. Christensen v. Harris County, 529 U.S. 576 (2000). Thus, if the hours spent responding to a fire call are bona fide volunteer hours for which no compensation is due, the employer may charge or dock the employee's compensatory time and thereby pay the person for the time taken off.

We note, however, that compensatory time off is a form of payment for overtime hours previously worked for which cash wages were not paid. Therefore, if the hours spent responding to a fire call are actually compensable hours worked, such as if the employee also is employed as a firefighter, then those hours are not time off. In that situation, the agency may not dock an employee's compensatory time bank to cover the wages due for the new hours worked. Attempting to use compensatory time in that manner would effectively be double counting – using the same compensatory time to pay for the original hours worked and to pay for the new hours.

The FLSA does not regulate the use of paid vacation or other leave provided by an employer.

ISSUE TWO -- Definition of the same public agency and the same type of services.

SCENARIO TWO

- The County A Fire Department is a joint powers board created pursuant to state law as a separate agency from the agencies which form it.
- The joint powers board is treated as a "special district government" in the Census of Governments.
- City B, County A and Town C appoint the joint powers board members, review annual budgets and provide funding.
- The joint powers board has no separate taxing authority.
- County A has two law enforcement agencies within 5,000 square miles, the Police and County Sheriff's Departments, which are sub-governments of the City and County respectively.
- The county has one hospital which is a separate government agency supported by its own tax district.
- The hospital runs the ambulance service that is staffed with full time and volunteer EMTs.
- There are no other law enforcement, fire departments or medical services within the county.
- The County Sheriff's Office and the County Fire Department are two different departments with two different governing bodies and are operating two different payrolls.

Q.1 May city police or county deputies volunteer as fire fighters without the City or County being responsible to pay overtime for those volunteer hours?

A.1 Your letter accurately restates DOL regulations 29 CFR Part 553.101, which define a public agency volunteer as an individual who:

1. Performs hours of service for a public agency for civic, charitable or humanitarian reasons without promise, expectation or receipt of compensation for services rendered [Part 553.101(a)];

2. Offers services freely and without pressure or coercion, direct or implied, from an employer [Part 553.101(c)]; and

3. Is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer [Part 553.101(d)].

Your letter does not provide information covering the first two criteria listed above but rather focuses on the third criteria. Consequently we will assume that criteria one and two above are met and will focus this response on the third criteria.

It is not necessary to analyze one aspect of the third criteria [Part 553.101(d)] if the other is met. If the individual is obviously not employed by the same public agency, (what you call the "who is an employer" question) then there is no need to examine the nature of the services provided (what you call the "what are the same type of services" question). Similarly, if the individual obviously does not perform the same type of services for the respective agencies, there is no need to examine the relationship of the agencies receiving the individual's services. In the interest of being responsive, however, we will analyze both aspects of the third criteria for your scenario, starting with the same public agency aspect.

You indicate that the facts in your County Fire Department (a joint powers board) scenario are similar to those found in a July 1, 1993 DOL letter ruling.

The July 1, 1993 letter found that a county vocational school system and the county were not considered separate and independent employers for purposes of Section 7(p)(1) of the FLSA. Section 7(p)(1) provides a "special detail" exception for fire protection and law enforcement employees of public agencies. This opinion was based in part on the indication that the "Census of Governments classifies county vocational schools as dependent agencies of the county government and they are not counted as separate governments". Moreover, the 1993 letter involved only a single county, not three separate public agencies that jointly fund and appoint members to the board of a fourth entity.

We disagree with your belief that the facts in your scenario are similar to those in the July 1, 1993 letter, as you indicate that the "joint powers board is treated as a separate 'special district government' by the Census Bureau". This is clearly opposite to the "dependent" classification of the school system discussed in July 1, 1993 letter.

Absent the existence of information indicating significant integration of the operations of the County Fire Department and the County Sheriffs Department/City Police Department it appears that these agencies are not the same public agency for purposes of determining bona fide volunteer status under the FLSA. This opinion is based on your indication that the:

- Census of Government treats the County Fire Department as a separate agency from the agencies that form it;

- County Sheriff's Office and the County Fire Department are two different departments with two different governing bodies and two different payrolls (we assume the same is differences exist between the City Police Department and the County Fire Department); and

- County Fire Department is created pursuant to a state law as a separate agency from the agencies that form it.

Your discussion of the second aspect of the third criteria, same type of services [Part 553.101(d)], explains some of the difficulties inherent in providing police and fire support in small or rural communities where small pools of trained emergency personnel must routinely perform multiple tasks. You indicate that emergency personnel often wear a number of different "hats", so that there is no "bright line" of services between the agencies.

As you are aware, a same type of services determination can only be made after an examination of all the facts and circumstances of a particular case. We believe, however, that the definition of same type of services typically allows for a determination that police and firefighters on the whole provide a different type of services, consistent with their different Dictionary of Occupational Titles categories. Responding to the same emergencies as the other, such as traffic accidents and fire calls, or acting as a medical first responder on occasion will typically not change the inherent difference in the two occupations.

We believe, for the reasons cited above, that the city police or county deputies described in your scenario may volunteer as fire fighters without incurring FLSA wage liability for their volunteer time.

Q.2 May paid firefighters with emergency medical technician certifications volunteer for the county ambulance service without being paid overtime by the fire department?

A.2 Your discussion related to this question cites extensively from two opinion letters dated April 20, 1993. These letters, written without a detailed analysis of the facts, concluded that career fire fighters who volunteer their services to private non-profit corporations that serve the same jurisdiction are volunteering for their employing public agency and must be compensated.

We withdrew these letters, and their conclusion that the provision of the same type of services in the same community precludes bona fide volunteer status, in a November 27, 2001 opinion letter (copy enclosed). This letter was written in light of the findings in the decision you cited, Benshoff v. City of Virginia Beach, 180 F.3d 136 (4th Cir. 1999).

You indicate that the county ambulance service is operated by the hospital, which is a separate public agency supported by its own tax district. However, your letter provides no specific information regarding whether state law and the Census treat the hospital as a separate public agency, whether its payroll, retirement and other personnel systems are separate, and whether it may sue and be sued in its own name. Additionally, you provide no evidence concerning the extent to which the county fire department exercises day-to-day control over the volunteer services provided to the county ambulance service. Consequently we are unable to determine if the entities are the same public agency. If the entities are determined to be separate public agencies under the FLSA, it is not necessary to determine if the individuals perform the same type of services.

Your scenario also provides insufficient information to make a same type of services determination. Consequently we are unable to provide a response to this question.

ISSUE THREE: The potential for otherwise bona fide volunteers to be employees because they receive some sort of remuneration for their services.

Q.1 Do unemployed volunteers or volunteers who are currently in college full time become employees of the department?

A.1 Your question focuses on Krause v. Cherry Hill Fire District 13, 969 F. Supp. 270 (D.N.J. 1997), in which the District Court found that the fire district could not eliminate part time employees (called non-career firefighters) and return them to volunteer status to avoid the minimum wage provisions of the FLSA, while still continuing to pay them significant hourly compensation.

This decision found that the fire district initially paid non-career fire fighters $8.00 per hour for "duty crew" shifts and $5.05 per hour for "sleep-in" shifts, then reduced the compensation for "sleep-in" shifts to $20.00 per eight hour shift. The Krause court found, and we agree, that non-career fire fighters expected and received hourly compensation in an amount greater than a nominal fee allowed by the regulations (29 CFR Part 553.106) and it was "clear that the plaintiffs were not volunteers."

The lack of other employment or the status as a full time college student does not affect the determination of whether an individual is a bona fide volunteer. The evaluation of the employment status vs. volunteer status of all individuals in the public sector, including the unemployed and college students, is done by the application of the factors found in Section 203(e)(4) of the FLSA and Regulations Part 553.101, as discussed in the beginning of A.1, Issue Two above.

You suggest that the Department take two actions:

- An interpretation of 29 U.S.C. Section 203 (e)(4)(a) should be done through a regulatory interpretation from DOL; and

- Provide a definition of "same type of services".

We believe that the current regulation, 29 CFR Part 553, Subpart B provides the interpretation and definition.

I hope the above has been responsive to your request. We stand ready to work with you at any time to support the wonderful spirit of volunteerism that sustains this country.

Sincerely,

Tammy D. McCutchen
Administrator

Enclosures

*Note: * The actual name(s) was removed to preserve privacy.*